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No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether § 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5), which eliminates the right to obtain relief from removal for noncitizens who have illegally reentered the United States after having been deported, applies to individuals who reentered the United States before April 1, 1997, the effective date of that provision.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 394 F.3d 881. The November 17, 2003, final order of the Bureau of Immigration and Customs Enforcement (Pet. App. 19a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005. The petition for a writ of certiorari was timely filed on April 12, 2005, and was granted on October 31, 2005. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 241(a)(5) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(5), as enacted by § 305(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009, provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

IIRIRA § 309(a), codified as note following 8 U.S.C. § 1101, provides in relevant part:

> [T]his subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date

of the enactment of this Act [*i.e.*, April 1, 1997].

INA § 242(f) (1996), 8 U.S.C. § 1252(f) (1996), repealed by IIRIRA § 306(a)(2), provided in relevant part:

> Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after the date of enactment of this Act [*i.e.*, June 27, 1952], on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry.

Other statutory and regulatory provisions relevant to this case are set forth as an addendum to this brief.

STATEMENT

This case presents the question whether INA § 241(a)(5)—which eliminates the right to obtain relief from removal for noncitizens who have illegally reentered the United States after having been deported—applies to individuals who reentered the United States before the effective date of that statute.

Under the two-stage framework for retroactivity analysis set forth by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), it is clear that INA § 241(a)(5) may *not* be applied to persons who reentered the United States before IIRIRA's effective date. First, applying standard rules of statutory construction, it is evident that Congress intended IIRIRA's reinstatement provision to apply only to individuals who reentered the United States after April 1, 1997. Second, even if congressional intent were not clearly discernable, application of INA § 241(a)(5) to persons who reentered the country before IIRIRA's effective date would be impermissibly retroactive because such application would impair pre-

existing rights and attach new legal consequences to events completed before the statute's enactment.

Resolution of the question presented will directly affect thousands of people—both noncitizens and their U.S.-citizen family members. It is no secret that many people, like petitioner, have illegally reentered the United States after being deported. Before IIRIRA's enactment, illegal reentrants were guaranteed the right to seek, and were eligible to receive, discretionary relief from deportation. Reentrants could reasonably expect that under a variety of circumstances—such as if, like petitioner, they married a U.S. citizen and led an otherwise law-abiding life over a sufficient number of years—they would have the opportunity to avoid deportation and possibly remain in the United States, notwithstanding the fact that they had reentered the country illegally. Indeed, one can safely assume that reentrants acted on that expectation, taking the possibility of relief into account when deciding to reenter the country. Petitioner and thousands of others similarly situated built lives in this country on the reasonable expectation that relief from deportation would be available. It would be grossly unfair—and contrary to this Court's precedent—if that expectation were now defeated, especially given the absence of a clear congressional mandate so commanding.

A. Statutory Background

Before April 1, 1997, the INA provided that if a person who had been deported for an enumerated reason (*e.g.*, commission of an aggravated felony) illegally reentered the United States, "the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry." INA § 242(f) (1996), 8 U.S.C. § 1252(f) (1996). While the consequences of such reinstatement could be relatively harsh, Congress drafted the statute narrowly. That former reinstatement provision did not apply to noncitizens who were initially deported simply for entering the country without inspection or for any other reason not

specifically enumerated in 8 U.S.C. § 1252(e) (1996). Moreover, under pre-1997 immigration law, noncitizens who had unlawfully reentered the United States after a previous deportation could apply for various forms of relief from renewed deportation, even if their previous deportation orders were subject to reinstatement. For example, under 8 U.S.C. § 1255(i) (1996), persons who met certain conditions were allowed to avoid deportation by seeking and obtaining a discretionary adjustment of status to that of lawful permanent resident. This discretionary relief was available to individuals who, like petitioner, were married to a United States citizen who filed a visa petition on the noncitizen's behalf.[1]

In 1996, Congress dramatically changed this legal landscape by enacting IIRIRA. Effective April 1, 1997 (see IIRIRA § 309(a)), IIRIRA repealed INA § 242(f) and replaced it with INA § 241(a)(5). This new reinstatement provision differs from its predecessor in several significant ways.

First, while under the old regime only persons who had been deported on certain specified grounds were subject to having their earlier deportation orders reinstated, INA § 241(a)(5) applies broadly to all noncitizens who were previously removed.[2] See Pet. App. 10a; see also, *e.g.*, *Bejjani* v. *INS*, 271 F.3d 670, 675 (6th Cir. 2001).

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[1] Other forms of relief from deportation were also available to persons who had unlawfully reentered the country. For example, relief under 8 U.S.C. § 1255(i) was available to noncitizens who were beneficiaries of labor-certification applications filed on their behalf by a U.S. employer. Similarly, in appropriate circumstances noncitizens could seek suspension of deportation, voluntary departure, asylum, and various other forms of relief. See pages 37, *infra*

[2] What had been known as "deportation" before IIRIRA is now known as "removal." See, *e.g.*, *Romani* v. *INS*, 146 F.3d 737, 739 n.3 (9th Cir. 1998) ("The IIRIRA repeals [the deportation provision] and replaces it with a new removal proceeding provision to be codified at 8 U.S.C. § 1229a.").

Second, INA § 241(a)(5) specifies that the earlier removal order is "not subject to being reopened or reviewed," and thus may no longer be subject to at least some forms of collateral challenge. See *Bejjani*, 271 F.3d at 675.

Finally, as noted above, the precursor statute allowed noncitizens subject to reinstatement to apply for relief from deportation under other sections of the INA. The new reinstatement provision, by contrast, precludes them from applying for or receiving any form of relief under the INA. See INA § 241(a)(5); Pet. App. 11a; *Bejjani*, 271 F.3d at 675.

Consequently, application of this new statute operates to deny to a large class of noncitizens relief that was available to them under the old regime.

B. Factual Background

Petitioner Humberto Fernandez-Vargas is a native and citizen of Mexico. Before his 2004 deportation (see page 6, *infra*), he lived in the United States illegally, and had done so since the 1970s. See Pet. App. 3a. During the 1970s and early 1980s petitioner was deported from the United States several times for immigration violations, most recently in 1981. See Pet. App. 3a, 26a. In January 1982, shortly after the last of those deportations, petitioner again reentered the United States without inspection. Pet. App. 3a, 19a. During the next twenty years he resided primarily in Utah, worked as a truck driver, owned his own trucking business, and was never arrested for any reason. See A.R. 41-42.[3]

In 1989, petitioner and his long-time companion, Rita—a U.S. citizen—had a child, Anthony Fernandez, also a U.S. citizen. See A.R. 42. Petitioner and Mrs. Fernandez married on March 30, 2001. See Pet. App. 3a. Thereafter, Mrs. Fernandez filed an immediate-relative visa petition on behalf of petitioner pursuant to 8 U.S.C. § 1151(b), and petitioner filed an application for adjustment of status under 8 U.S.C.

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[3] A.R. refers to the Certified Administrative Record before the Tenth Circuit.

§ 1255(i). See Pet. App. 3a-4a; A.R. 41-46. Petitioner paid the $1,000.00 "penalty" fee for having entered the United States without inspection; the Immigration and Naturalization Service ("INS") accepted petitioner's application and fee notwithstanding his illegal reentry. See A.R. 45-46. Indeed, in light of the pending application for adjustment, the Bureau of Citizenship and Immigration Service ("BCIS")—the agency within the Department of Homeland Security that largely replaced the INS, and that is now known as the U.S. Citizenship and Immigration Services ("USCIS")—provided petitioner with employment authorization. See 10th Cir. Pet. Rev. 3-4.

On or about November 1, 2003, petitioner appeared at the Salt Lake City BCIS office for a routine interview in connection with his visa petition. But when he arrived, he was arrested by an officer from the Bureau of Immigration and Customs Enforcement, now known as U.S. Immigration and Customs Enforcement (collectively, "ICE"), based on ICE's assertion that his 1981 deportation order was subject to reinstatement under INA § 241(a)(5) and that, as a result, he was statutorily barred from applying for adjustment of status under 8 U.S.C. § 1255(i). See Pet. App. 4a. On November 7, 2003, ICE issued a notice of its intent to reinstate petitioner's prior deportation order. A.R. 4. On November 17, 2003, ICE issued an order reinstating petitioner's prior deportation order, see *ibid.*, and that same day issued a warrant commanding his arrest and removal from the United States. See Pet. App. 4a, 19a-20a. On September 9, 2004, after nearly a year of detention and while his petition for review was pending in the Tenth Circuit, petitioner was removed from the United States to Juarez, Mexico. See D. Romboy, *Outcast in Mexico, Outlaw in Utah*, DESERET MORNING NEWS, Oct. 9, 2005, at A1, *available at* http://deseretnews.com/dn/view/0,1249,615152228,00.html.[4] His wife and son remain in Utah. *Ibid.*

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[4] As the government concedes, the fact that petitioner has been

C. Proceedings Below

Pursuant to 8 U.S.C. § 1252(a) and (b)(2), and 28 U.S.C. § 2342, petitioner sought review of the ICE decision in the Tenth Circuit. Petitioner contended that because he had reentered the United States before the effective date of IIRIRA—April 1, 1997—INA § 241(a)(5) did not apply to his case, and that ICE had therefore erred in reinstating the previous deportation order and in refusing to allow him to pursue an adjustment of status under 8 U.S.C. § 1255(i).

The court of appeals' resolution of the case turned on the question whether INA § 241(a)(5) applies despite the fact that petitioner reentered the United States before the effective date of IIRIRA. The court analyzed this question using the analytical framework that this Court specified in *Landgraf* for determining whether a federal statute applies to pre-enactment conduct despite the strong historical presumption against retroactivity. Expressly noting that the issue had split the federal circuits (see Pet. App. 12a), the Tenth Circuit held that INA § 241(a)(5) applied to petitioner. See Pet. App. 18a.

Under *Landgraf*, a "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. Rejecting the contrary decisions of the Sixth and Ninth Circuits (see Pet. App. 12a, 16a (rejecting *Castro-Cortez* v. *INS*, 239 F.3d 1037 (9th Cir. 2001), and *Bejjani*, 271 F.3d 670)), the Tenth Circuit held that Congress had not clearly provided that INA § 241(a)(5) applies only to individuals who reentered the United States after IIRIRA's effective date. Pet. App. 16a. In so holding, the court sided with six other circuits—the First, Third, Fourth, Fifth, Eighth, and Eleventh—that also "have determined that application of the normal rules of statutory construction does not reveal unambiguous congressional intent as to the temporal scope of INA § 241(a)(5)." Pet. App.

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removed to Mexico "does not moot the proceedings." U.S. Cert. Resp. 7 n.5 (citing *Bejjani*, 271 F.3d at 688-689).

12a-13a (citing *Sarmiento Cisneros* v. *United States Att'y Gen.*, 381 F.3d 1277, 1280-1284 (11th Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 10-13 (1st Cir. 2003); *Avila-Macias* v. *Ashcroft*, 328 F.3d 108, 112-114 (3d Cir. 2003); *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 297-299 (5th Cir. 2002); *Alvarez-Portillo* v. *Ashcroft*, 280 F.3d 858, 864-865 (8th Cir. 2002); and *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 105-108 (4th Cir. 2001)).[5]

Having failed to find that congressional intent was sufficiently clear to allow it to stop with the first stage of *Landgraf*'s retroactivity analysis, the Tenth Circuit proceeded to the second stage, under which a court "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280; see also Pet. App. 16a.[6]

The Tenth Circuit noted that a number of courts of appeals have "held that barring an application for adjustment under INA § 241(a)(5) is an impermissible retroactive effect." Pet. App. 16a-17a & n.12 (citing *Sarmiento Cisneros*, 381 F.3d at 1284; *Arevalo*, 344 F.3d at 14; and *Alvarez-Portillo*, 280 F.3d at 861). It distinguished two of those cases on the ground that the petitioners in those cases had not only

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[5] Two weeks after the Tenth Circuit's decision in this case, the Seventh Circuit also held that Congress had not clearly defined the temporal scope of INA § 241(a)(5). See *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799, 804 (7th Cir. 2005)

[6] "If the statute *would* operate retroactively, [the] traditional presumption [against retroactivity] teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280 (emphasis added). No court has ever held that there is "clear congressional intent" that INA § 241(a)(5) apply retroactively. Thus, all courts would agree that if the statute has "retroactive effect" as applied to a person who reentered the United States before April 1, 1997, it would not apply.

reentered the United States before IIRIRA's effective date, but had also filed applications for adjustment of status before that date. See Pet. App. 17a-18a. The court acknowledged that in a third case—the Eighth Circuit's decision in *Alvarez-Portillo*—the petitioner had reentered the United States before IIRIRA's effective date but had not filed an adjustment application until after that date. It nonetheless distinguished *Alvarez-Portillo* on the ground that, unlike here, the petitioner not only had reentered the United States before IIRIRA's effective date but also had married a U.S. citizen before that date. See Pet. App. 17a n.12. The court concluded that applying INA § 241(a)(5) to petitioner would not give the statute retroactive effect because he had no "protectable expectation of being able to adjust his status" in that "the only event completed before [IIRIRA's effective date] was his illegal re-entry into the United States." Pet. App. 17a.

As a result, the court held that INA § 241(a)(5) applied to petitioner and barred his application for adjustment of status.[7]

SUMMARY OF ARGUMENT

Applying *Landgraf*'s two-step framework, this Court should conclude that INA § 241(a)(5) does not apply to individuals, like petitioner, who reentered the United States before IIRIRA's effective date.

1. The temporal scope of INA § 241(a)(5) is readily ascertainable. As an initial matter, Congress specified that the changes introduced by IIRIRA not take effect until April 1, 1997. Application of several well-accepted rules of statutory construction confirms that Congress intended just what that plain language provides—that INA § 241(a)(5) does not im-

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[7] In the court of appeals petitioner also argued that INA § 241(a)(5) would not preclude his application for adjustment of status under 8 U.S.C. § 1255(i) even if the reinstatement statute were applicable to him. The court of appeals rejected this argument (see Pet. App. 4a-9a), and petitioner does not challenge that determination in this Court.

pose additional consequences on pre-enactment conduct like petitioner's reentry.

In enacting IIRIRA, Congress eliminated from the former reinstatement provision express language making reinstatement retroactively applicable to reentries occurring before the former statute's effective date. Had Congress intended the new statute to apply to persons in petitioner's circumstances, it could, and presumably would, have left the retroactivity language from the former statute unchanged. Congress's decision to remove this language is strong evidence that Congress did not intend for the new, harsher reinstatement provision to apply retroactively. This Court must give effect to that congressional determination. See Part I.A.1, *infra*.

The legislative history of the statute confirms this interpretation of INA § 241(a)(5). Congress considered and *rejected* language that would have made the new provision expressly retroactive. The House and the Senate initially disagreed regarding the appropriate scope of the reinstatement provision. The Senate's version of the bill would have applied reinstatement to a narrow class of reentrants, but would have included language requiring the statute to apply retroactively. In contrast, the House bill applied to a broader class of reentrants, but did not contain any retroactivity language. A bipartisan committee resolved this dispute by adopting the House version of the bill and excluding any retroactivity language. By doing so, Congress implicitly proscribed the retroactive application of INA § 241(a)(5). See Part I.A.2, *infra*.

Moreover, this Court must assume that Congress enacted IIRIRA with knowledge of the applicable background legal rules, including the strong presumption against retroactive application of statutes. Thus, Congress knew or must be deemed to have known the necessity of being explicit if it intended that any provision of IIRIRA, including the reinstatement provision, apply to conduct antedating the statute's effective date. Against this background rule, Congress's si-

lence reveals its intent that INA § 241(a)(5) not apply to reentries that occurred before its enactment. See Part I.A.3, *infra*.

Further, the longstanding principle of construing ambiguities in immigration statutes in favor of aliens counsels against retroactive application of the reinstatement provision. This rule recognizes the drastic hardship deportation imposes on persons, like petitioner, who have established deep roots in this country despite having entered unlawfully. Therefore, any ambiguity as to the temporal scope of IIRIRA's reinstatement provision should be interpreted against its retroactive application. See Part I.A.4, *infra*.

Rather than resolving the perceived ambiguity in INA § 241(a)(5) in petitioner's favor, the Tenth Circuit erroneously held that the statute itself would not control the temporal-scope inquiry absent an *unambiguous* showing that Congress intended the statute to apply prospectively. This approach effectively eviscerates the traditional presumption against retroactivity. Nothing in this Court's retroactivity jurisprudence suggests that unambiguous clarity is needed before a court should interpret a statute only to apply to future conduct. Rather, applying the traditional presumption, this Court has determined that when the ordinary rules of statutory construction support the conclusion that Congress intended the statute to apply only prospectively, that construction of the statute controls even if the statute is not entirely clear on the issue. Adequate evidence of congressional intent exists such that this Court should conclude that only prospective application of INA § 241(a)(5) is authorized. See Part I.B, *infra*.

2. Application of INA § 241(a)(5) to petitioner is also inappropriate because that application would afford the statute an impermissibly retroactive effect under stage two of a *Landgraf* analysis. The provision regulates reentry into the United States. It penalizes persons who illegally reenter the country after having been previously deported and, in par-

ticular, denies such persons the right to seek and the opportunity to receive the discretionary relief from deportation to which they would otherwise be entitled. Because it is illegal reentry that triggers the statute's application, it is that act that constitutes the relevant event for purposes of retroactivity analysis. See Part II.A, *infra*.

Before IIRIRA took effect on April 1, 1997, persons who illegally reentered the United States after a prior deportation had the right to seek, and were eligible to receive, various forms of discretionary relief from renewed deportation, including adjustment of status, suspension of deportation, and voluntary departure. INA § 241(a)(5) now deprives these same people of that right and those opportunities. Thus, when applied to persons who reentered the United States before April 1, 1997, INA § 241(a)(5) attaches a new legal consequence to the previously completed act of illegal reentry. See Part II.B.1, *infra*.

Petitioner reentered the United States in 1982. From the day he reentered through the day IIRIRA took effect, petitioner was immediately eligible to seek and obtain discretionary relief from deportation. Under the law as it stood before IIRIRA, petitioner could have sought such relief either proactively or defensively in a deportation proceeding. By depriving petitioner and others who reentered the United States before April 1, 1997, of the opportunity to obtain such relief, INA § 241(a)(5) has an impermissibly retroactive effect when applied to him and those similarly situated. See Part II.B.2, *infra*.

The fact that the relief that was available to petitioner and other illegal reentrants before April 1, 1997, was discretionary is immaterial. Although there was no guarantee that a particular person would be granted discretionary relief, each person who reentered the country before April 1, 1997, had a right to seek, and was eligible to receive, such relief. By depriving reentrants of that right, INA § 241(a)(5) converts what had previously been *possible* deportation into what is

now *certain* deportation. That conversion, which is of immense practical significance to reentrants facing deportation, is—as recognized by this Court in *INS* v. *St. Cyr*, 533 U.S. 289 (2001)—sufficient to make application of INA § 241(a)(5) to petitioner and those similarly situated impermissibly retroactive. See Part II.C, *infra*.

Because discretionary relief from deportation—which could greatly alleviate the practical consequences of illegal reentry—was readily available before IIRIRA, persons who reentered the country before April 1, 1997, are likely to have done so with the reasonable expectation that they could in fact seek and obtain such relief. Nonetheless, as established by *Landgraf*, *Hughes Aircraft Co.* v. *U.S. ex rel. Schumer*, 520 U.S. 939 (1997), and *St. Cyr*, petitioner has no obligation to prove that he himself in fact relied on prior law in order to demonstrate that application of INA § 241(a)(5) to him would be impermissibly retroactive. See Part II.D, *infra*.

Finally, retroactive application of INA § 241(a)(5) to petitioner would be extremely unfair. Petitioner lived in the United States for more than two decades after reentering the country. During that time he built a productive, law-abiding life. He married a U.S. citizen, raised a U.S.-citizen child, built a successful business, and was never arrested. After more than two decades in the United States, deportation is tantamount to exile. It would be particularly unjust to deprive petitioner of the opportunity to obtain discretionary relief from deportation as a result of his illegal reentry more than twenty years ago when people who did *not* lead law-abiding lives after entering the United States are, under *St. Cyr*, guaranteed precisely that opportunity. See Part II.E, *infra*.

ARGUMENT

The government has interpreted IIRIRA's reinstatement provision to work a dramatic change in the legal consequences of petitioner's 1982 reentry. Petitioner reentered the United States under a statutory scheme that enabled him to seek to become a lawful resident from within the country.

Nonetheless, based on that 20-year-old act of reentry, Petitioner has been ripped from his family, removed to Mexico, and deprived of his pre-existing right to pursue the discretionary relief he almost certainly would have been afforded under prior law. Because there is no indication that Congress intended such retroactive application of INA § 241(a)(5), the government's interpretation of that provision is untenable.

The principle that "[r]etroactivity is not favored in the law," *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), is not new. As this Court has stated, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265; see also *ibid.* ("'The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'") (quoting *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Indeed, as Chief Justice Marshall declared,

> It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable.

Reynolds v. *McArthur*, 27 U.S. (2 Pet.) 417, 434 (1829).

In the criminal context, such retroactive legislation is flatly prohibited by the *Ex Post Facto* Clause of the Constitution. In the civil context, "[r]etroactivity, even where permissible, is not favored, except upon the clearest mandate." *Claridge Apartments Co.* v. *Comm'r*, 323 U.S. 141, 164 (1944).[8] As Justice Brandeis has observed, "[t]hat a statute

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[8] As this Court noted in *Landgraf*, the general principle against retroactive legislation finds expression in numerous constitutional provisions applicable in the civil context:

shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application." *United States* v. *St. Louis, S.F. & T. Ry. Co.*, 270 U.S. 1, 3 (1926).

More recently, this Court has set forth a two-step framework for determining whether a statute may permissibly be applied to conduct antedating its enactment despite the strong presumption against retroactivity. First, a court is to "determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If the statute's proper reach is either expressly stated or discernable through the "normal rules of construction," then the statute controls and the retroactivity inquiry ends. *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997). When the proper reach of the statute cannot be ascertained, "the court must determine whether the new statute would have a retroactive effect," in which case the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280; see also *St. Cyr*, 533 U.S. at 326; *Martin* v. *Hadix*, 527 U.S. 343, 361-362 (1999).

Both steps of the *Landgraf* analysis lead to the conclusion

Article I, § 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I §§ 9-10, prohibit the legislatures from singling out disfavored persons and meting out summary punishment for past conduct. The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application.

Landgraf, 511 U.S. at 266.

that INA § 241(a)(5) may not be applied to deny persons who reentered the United States before IIRIRA's effective date their pre-existing right to pursue discretionary relief from removal.

I. Congress Intended INA § 241(a)(5) To Apply Only To Persons Who Reentered The United States After April 1, 1997.

This Court's first task is to determine the temporal reach of INA § 241(a)(5) using the normal rules of statutory construction. Although the text of INA § 241(a)(5) does not explicitly state the temporal scope of that provision, Congress provided generally that IIRIRA would not be effective until April 1, 1997, the "first day of the first month beginning more than 180 days after the date of enactment." IIRIRA § 309(a). Application of several well-recognized principles of statutory construction, in conjunction with the plain language of IIRIRA's effective date, lead to the unavoidable conclusion that Congress specifically intended INA § 241(a)(5) to apply only to individuals who reentered the United States after April 1, 1997. Thus, here, as in *Lindh*, there is no need to reach the question whether the statute has retroactive "effect" under step two of *Landgraf*.

A. Using ordinary rules of statutory construction, INA § 241(a)(5) should be interpreted to apply only to those persons who reentered after IIRIRA's effective date.

1. The proper interpretation of INA § 241(a)(5) must give effect to Congress's elimination of retroactivity language from the previous reinstatement provision.

That Congress did not intend INA § 241(a)(5) to apply to noncitizens who reentered the United States before April 1, 1997, is made clear by comparing that provision to its predecessor. As explained above, "INA § 241(a)(5) replaced the former reinstatement provision, INA § 242(f), 8 U.S.C.

§ 1252(f) (repealed 1996)." Pet. App. 2a. The repealed provision was more limited in scope and effect than the new provision, but expressly provided that it was applicable to all persons who illegally reentered the United States "whether before or after the date of enactment of this Act," June 27, 1952. See INA § 242(f) (1996); Pub. L. No. 82-414 § 242(f), 66 Stat. 163, 212 (1952). As several courts have noted, "[t]his language clearly expressed Congress's intent that prior orders of deportation could be reinstated even if the alien reentered the country prior to the enactment of that reinstatement provision." *Bejjani*, 271 F.3d at 684; see also, *e.g.*, *Arevalo*, 344 F.3d at 12; *Castro-Cortez*, 239 F.3d at 1051. But when Congress rewrote the reinstatement provision in 1996, it eliminated the language making reinstatement applicable to persons who unlawfully reentered before the statute's effective date (while simultaneously providing that reinstatement would apply to a broader class of illegal reentrants). Compare INA § 242(f) (repealed 1996) with INA § 241(a)(5).

This Court has long recognized the "canon of statutory construction requiring a change in language to be read, if possible, to have some effect." *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992). The only interpretation of INA § 241(a)(5) that gives effect to Congress' elimination of the retroactivity language from the predecessor provision is that Congress intended the current provision to apply only prospectively to reentries occurring after IIRIRA's effective date. Had Congress intended to apply IIRIRA's new reinstatement provision to reentries that occurred before its enactment, Congress would have either updated the express retroactivity language in the prior statute to reflect IIRIRA's effective date or left the retroactivity language from the previous provision unchanged.[9] Instead, Congress eliminated the

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[9] As originally enacted, the prior provision specified that it applied to reentries antedating "enactment of this Act." Pub. L. No. 82-414 § 242(f), 66 Stat. 163, 212 (1952). The version contained

retroactivity language entirely. That change in language would be entirely ineffectual if INA § 241(a)(5) is interpreted to apply as if it had the same explicitly retroactive language that was contained in the predecessor statute.

Congress's omission of retroactivity language from INA § 241(a)(5) is strong evidence that it disapproved of applying the new reinstatement provision retroactively.[10] See *Brewster* v. *Gage*, 280 U.S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."); *Nalley* v. *Nalley*, 53 F.3d 649, 652 (4th Cir. 1995) ("When the wording of an amended statute differs in substance from the wording of the statute prior to amendment, we can only conclude that Congress intended the amended statute to have a different meaning."). Having expressly provided that the former reinstatement provision would apply to reentries pre-dating its effective date, Congress could be expected to include similar

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in the U.S. Code replaced that phrase with the specific date—June 27, 1952. Congress could have incorporated either into the new reinstatement provision. As the Ninth Circuit has noted, "Congress often leaves specific dates in statutory provisions without updating the date when it revises the statute with the effect that the updated provision applies retroactively from the initial, unchanged date in the statute." *Castro-Cortez*, 239 F.3d at 1051 n.15 (citing 26 U.S.C. § 171(b)(1)(B)(ii)).

[10] There are any number of reasons why Congress may have decided not to apply INA § 241(a)(5) retroactively. As noted above (at 3-4), INA § 241(a)(5) applies to a far broader class of aliens than did its predecessor. Thus, Congress may have eliminated the prior retroactivity language precisely because the new reinstatement provision greatly expanded the class of persons subject to its reach. Moreover, Congress presumably was aware that retroactive application of INA § 241(a)(5) would upset settled expectations of noncitizens who, like petitioner, reentered the United States decades before IIRIRA's enactment under a statutory scheme in which they were entitled to apply for discretionary relief from future deportation. See Part II.D, *infra*.

language in the current statute had it intended the new reinstatement provision also to apply retroactively. It would violate ordinary rules of statutory construction, and defy common sense, to conclude that, despite removing all retroactivity language, Congress intended to leave open the possibility of applying INA § 241(a)(5) retroactively to immigrants who reentered the United States before IIRIRA's effective date. See *Castro-Cortez*, 239 F.3d at 1051 ("Congress's decision to remove the retroactivity language from this part of the statute provides strong support for the conclusion that it did not intend that the revised provision be applied to reentries occurring before the date of the statute's enactment."); *Bejjani*, 271 F.3d at 684 ("[T]he complete elimination of the retroactive language from the reinstatement provision is persuasive evidence that Congress did not intend for the new reinstatement provision to apply to reentries which occurred prior to the statute's effective date.").[11]

This Court drew a similar inference of prospective intent in *Lindh* by noting the differences in two closely related statutory provisions enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. The Court held that Congress's inclusion of retroactivity language in one provision "indicat[ed] implicitly" that the provision excluding such language was intended to apply only prospectively. 521 U.S. at 327. Although the inference in *Lindh* was drawn from two

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[11] The Tenth Circuit agreed that "Congress's elimination of the previous retroactivity language lends weight to the argument that Congress intended the statute to apply only prospectively." Pet. App. 14a. However, the court erroneously held that this indication of congressional intent was insufficient to meet the requirement of absolute clarity purportedly set forth in *Landgraf*. See *id.* at 15a-16a. As we explain below, such absolute clarity is not required when the ordinary rules of statutory construction lead a court to conclude that a statute applies only *prospectively*. See Part I.B, *infra*.

parallel provisions of the same statute, that inference is no less applicable here, when Congress amended the earlier reinstatement provision to exclude all retroactive language. Here, as in *Lindh*, "[n]othing * * * but a different intent explains the different treatment." *Id.* at 329.

Although the elimination of retroactivity language in INA § 241(a)(5) reveals specific congressional intent to apply the statute only prospectively—a conclusion reinforced by the legislative history (see Part I.A.2, *infra*)—even inadvertent omissions of statutory language must be given legal effect. In the words of Justice Brandeis:

> The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

Iselin v. *United States*, 270 U.S. 245, 250-251 (1926). As in *Iselin*, the government herein effectively asks this Court to enlarge IIRIRA's carefully drafted language by reinserting the retroactivity language from prior law that Congress omitted from INA § 241(a)(5). Given that all available evidence strongly suggests that the omission was *intentional*, the government's suggested interpretation would "transcend[] the judicial function" to an even greater extent than were that omission merely inadvertent.[12]

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[12] In *Sarmiento Cisneros*, the Eleventh Circuit agreed that "the removal of the retroactivity language from the statute lends weight to" the argument that INA § 241(a)(5) was not intended to apply to prior reentries, but also remarked that "[a]nother rational explanation for the removal of the language is that Congress believed the language was surplusage." 381 F.3d at 1282. That latter conclusion is flatly inconsistent with this Court's recognition that Congress is presumed to know the legal background against which it legislates. As explained more fully below (see Part I.A.3, *infra*), this Court's

2. The legislative history of INA § 241(a)(5) confirms that Congress intended that provision to apply only prospectively.

The legislative history of INA § 241(a)(5) confirms that Congress's decision to omit the prior retroactivity language from INA § 241(a)(5) was no accident.[13] Rather, Congress explicitly "considered and *rejected* new language which would have applied the new reinstatement provision to illegal reentries which occurred before the date of enactment." *Bejjani*, 271 F.3d at 685 (emphasis added). This too is strong evidence that Congress intended INA § 241(a)(5) to apply only prospectively.

The current reinstatement provision originated with a bill (H.R. 2202) passed in the House in March 1996. See H.R. REP. NO. 104-469(I), at 26 (1996), 1996 WL 168955; 142 Cong. Rec. H2589 (March 4, 1996). At that time, the Senate was simultaneously considering a different version of the immigration-reform bill (S.1664), that contained a reinstatement provision that, like the statute then in effect, applied only to a narrow class of deported individuals and included express retroactivity language. S. REP. NO. 104-249, at 118 (1996), 1996 WL 180026.

When the House bill was called up on the Senate floor in May 1996, the Senate amended the bill by replacing the

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decision in *Landgraf* put Congress on notice as to the "wisdom of being explicit" if it intends a statute to apply retroactively, even when the statute in question may not have true retroactive effect. *Lindh*, 521 U.S. at 328. Against that background legal rule, Congress's silence as to the retroactive effect of INA § 241(a)(5) weighs heavily in favor of interpreting it to apply only prospectively. Affirmative *removal* of retroactivity language is even weightier evidence that Congress did not intend the statute to apply retroactively.

[13] This Court routinely looks to legislative history to determine whether Congress prescribed the temporal reach of a statute. See, *e.g.*, *Lindh*, 521 U.S. at 329-330 & n.6; *Landgraf*, 511 U.S. at 262.

House's version of the text with its own version, which included retroactivity language in the reinstatement provision. See 142 Cong. Rec. S4610-S4612 (May 2, 1996). The bill then returned to the House, which noted its disagreement with the Senate amendment and agreed to a conference. See 142 Cong. Rec. H10194-H10195 (Sept. 11, 1996). Two weeks later, a bipartisan conference committee emerged with a compromise bill that included the House's broader version of the reinstatement provision (thus applying to all previously deported persons), but that excluded the Senate's explicit retroactivity language. See H.R. REP. NO. 104-828, at 54 (1996), 1996 WL 563320.

As this Court has recognized, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) (quoting *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-393 (1980) (Stewart, J., dissenting)); cf. *Lonchar* v. *Thomas*, 517 U.S. 314, 325-327 (1996) (refusing to interpret the habeas rules to relax the prejudice requirement because Congress "*rejected*, by removing from the draft Rule, a provision that would have eased the burden of the prejudice requirement").

A difference between the language of a prior version of a bill and the enacted version is particularly strong evidence of congressional intent when, as here, "it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both Houses of Congress." *Goncalves* v. *Reno*, 144 F.3d 110, 132 (1st Cir. 1998); cf. *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). In such a context, Congress's intent is clearly manifested by its decision not to include the disputed lan-

guage. See, *e.g.*, *Massachusetts Assoc. of Health Maint. Orgs.* v. *Ruthardt*, 194 F.3d 176, 185 (1st Cir. 1999) ("Congress sometimes can speak as clearly by opting not to enact proffered language as by enacting it.").

Applying this cannon of construction in a similar context, the lower courts have uniformly held that AEDPA § 440(d) does not apply to cases pending before its enactment. That provision purported to expand the definition of an aggravated felony for immigration purposes and thereby to restrict the availability of certain discretionary relief from deportation. Courts that confronted the question whether AEDPA § 440(d)'s restrictions applied to cases pending at the time AEDPA was enacted looked to that statute's legislative history and noted that the Senate version, in contrast to the House version, included explicit language making the restrictions in AEDPA § 440(d) applicable to all pending cases. However, the "compromise bill that came out of the conference committee * * * did not contain the Senate bill's language on retroactivity." *Henderson* v. *INS*, 157 F.3d 106, 130 (2d Cir. 1998). As these courts explained, the contrasting language between the Senate version and the version actually enacted is more than adequate evidence of Congress's intent that the statute apply only prospectively. See, *e.g.*, *Pak* v. *Reno*, 196 F.3d 666, 676 (6th Cir. 1999) ("Congress had considered a retroactivity provision but decided against it. With such strong evidence of congressional intent, we refuse to include in the language of the statute a provision that Congress chose to omit."); *Sandoval* v. *Reno*, 166 F.3d 225, 241 (3d Cir. 1999) (noting that Congress deleted retroactivity language contained in prior version of bill and holding that "[t]his legislative history confirms that Congress deliberately chose to make AEDPA § 440(d) apply prospectively"); see also, *e.g.*, *Henderson*, 157 F.3d at 130; *Goncalves*, 144 F.3d at 131-133; *Shah* v. *Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano* v. *INS*, 200 F.3d 603, 610-611 (9th Cir. 1999); *Mayers* v. *INS*, 175 F.3d 1289, 1303-1304 (11th Cir. 1999).

In sum, because Congress explicitly considered and rejected language applying the reinstatement provision to conduct antedating IIRIRA's effective date, this Court should not interpret the provision to do just that.

3. Congress enacted INA § 241(a)(5) against the background of this Court's default rule against retroactivity.

Even if there were some lingering doubt about Congress's intent as to the retroactive applicability of INA § 241(a)(5), that provision must still be interpreted to apply only prospectively. In interpreting statutes, courts must assume that Congress knows the legal background against which it legislates. Thus, this Court has held that "the courts may take it as given that Congress has legislated with an expectation that the [background] principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (internal quotation marks omitted); see also *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533-535 (1994). Against the background of *Landgraf*'s default rule, congressional silence as to the temporal scope of INA § 241(a)(5) speaks volumes.

Just two years before Congress enacted IIRIRA, this Court reaffirmed the strong presumption against retroactivity and held that a statute would not be interpreted to apply retroactively absent a clear expression that Congress intended that result. See *Landgraf*, 511 U.S. at 272 ("prospectivity remains the appropriate default rule"). Moreover, this Court stressed that any enacted legislation would be interpreted against the background of this default rule. As the Court explained, "[s]uch a [clear intent] requirement * * * has the additional virtue of giving legislators a predictable background rule against which to legislate." *Id.* at 273. In essence, Congress has been put on notice as to the "wisdom of being explicit" if it intends a provision to be applied to conduct antedating a statute's effective date. *Lindh*, 521 U.S. at 328. Thus, "[n]otwithstanding whether a statute actually has an

impermissibly retroactive effect, Congress is deemed to enact legislation with *Landgraf*'s 'default rule' in mind." *Castro-Cortez*, 239 F.3d at 1052; see also *Bejjani*, 271 F.3d at 687 ("Congress is presumed to be familiar with the judicial presumption against retroactive application, and thus Congress must explicitly provide for such."); *Downer* v. *United States*, 97 F.3d 999, 1003 n.3 (8th Cir. 1996) (because Congress "is presumed to know the legal background in which it is legislating," "we interpret as intentional Congress's silence on the subject of retroactivity").

Against this strong background rule, Congress must be presumed to understand that it needs to provide clear instruction when it desires to give any specific statutory provision retroactive application. Indeed, in enacting IIRIRA, Congress knew to be explicit when it intended for provisions of that statute to apply retroactively: Several other sections of IIRIRA specifically state that they *are* to be applied retroactively.[14] *Bejjani*, 271 F.3d at 686 ("[C]omparing § 241(a)(5) to other provisions is useful in demonstrating that where Congress specifically wished for a provision to apply in a certain manner, Congress knew how to accomplish that, and did so throughout IIRIRA."); *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another * * *, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and citation omitted). Having done so elsewhere in the statute, Congress surely would have done so in INA § 241(a)(5) had it wished for that result.

In short, Congress knew—or must be deemed to have known—that its silence with regard to the temporal scope of INA § 241(a)(5) would be construed to mean that the new re-

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[14] See, *e.g.*, IIRIRA §§ 212(e), 322(c), 342(b), 347(c), 348(b) & 351(c).

instatement provision would apply only prospectively. See, *e.g.*, *Olatunji* v. *Ashcroft*, 387 F.3d 383, 389 (4th Cir. 2004) ("In the face of congressional silence on the temporal reach of a given statute, it is presumed that Congress did not intend for the statute to be applied retroactively."); *Downer*, 97 F.3d at 1003 n.3 ("we interpret as intentional Congress's silence on the subject of retroactivity"); *Boria* v. *Keane*, 90 F.3d 36, 38 (2d Cir. 1996) ("[The statute's] silence, coupled with the presumption against retroactivity, leads us to hold that the new statute does not apply to this case."). Nonetheless, rather than explicitly stating an intent for INA § 241(a)(5) to apply retroactively, as it had done in various other sections of IIRIRA, Congress specifically eliminated retroactivity language from the prior reinstatement provision and rejected a proposed version of the bill that contained explicit retroactivity language. When judged against *Landgraf*'s background rule, the only reasonable interpretation of Congress's silence is that "Congress intended § 241(a)(5) to encompass only post-enactment reentries." *Castro-Cortez*, 239 F.3d at 1052; *Bejjani*, 271 F.3d at 686 ("The absence of an express directive from Congress, viewed in light of *Landgraf*'s default rule, persuades us * * * that in this case, congressional silence is instructive.") (internal quotation marks omitted).[15]

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[15] Although, as the Tenth Circuit noted below, Congress also specified that certain sections of IIRIRA would apply only prospectively (Pet. App. 14a; see also U.S. Cert. Resp. 13 n.7), that does not undermine the argument that congressional silence with respect to INA § 241(a)(5) should be interpreted as providing for prospective application of that provision. Congress must be presumed to follow this Court's admonition to always speak clearly when seeking to apply a statute retroactively, even if it sometimes also unnecessarily speaks clearly when enacting prospective legislation. Importantly, Congress's clear language regarding the temporal scope of a provision closely related to INA § 241(a)(5) demonstrates its intent to apply only prospectively those sections of IIRIRA relating to reentries after a prior deportation. In expanding the scope of the criminal prohibition against unlawful reentry,

4. Any ambiguity in INA § 241(a)(5) must be construed in favor of the alien.

Finally, in addition to knowing that it must speak clearly to overcome the presumption against retroactivity, Congress must also be deemed to have enacted INA § 241(a)(5) with knowledge of "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449; see also, *e.g.*, *St. Cyr*, 533 U.S. at 320 ("The presumption against retroactive application of ambiguous statutory provisions, buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien, forecloses the conclusion that, in enacting § 304(b), Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."); *INS* v. *Errico*, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."). This rule of statutory construction recognizes that "deportation is a drastic measure," indeed, "a penalty." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10

Congress explicitly stated that criminal liability "shall apply to departures that occurred before, on, or after the date of the enactment of [IIRIRA], but *only with respect to entries (and attempted entries) occurring on or after such date*." IIRIRA § 324(c) (emphasis added). Congress's intent to expand criminal liability for reentries following *all* departures, even those predating IIRIRA—and its concomitant need to state that intent explicitly—required Congress to clarify that such liability would be imposed only prospectively on future reentries. As the Third Circuit explained, "it could well be argued that this is likely what Congress intended with regard to [INA § 241(a)(5)] as well." *Avila-Macias*, 328 F.3d at 113 n.6 (emphasis added). Indeed, there is no conceivable reason why Congress would want INA § 241(a)(5) and the criminal prohibition against unlawful reentry to apply differently, and this Court should interpret the provisions consistently.

(1948). In this case, petitioner's removal is a penalty for conduct—his illegal reentry—that occurred more than 20 years ago, at a time when the consequences for illegal reentry were far less severe than under the post-IIRIRA regime. Had Congress intended to upset the long-settled expectations of such reentrants, it had to do so clearly.

Because "the stakes are considerable for the individual," this Court should "not assume that Congress meant to trench on [petitioner's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Ibid.* As discussed above, the available evidence shows that Congress intended INA § 241(a)(5) to apply only prospectively. But to the extent that the Court concludes that this evidence does not resolve all ambiguity, the Court must "nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner." *Costello* v. *INS*, 376 U.S. 120, 128 (1964) (construing statute narrowly in favor of petitioner even though "[t]o construe this statutory provision less generously to the alien might find support in logic"). This background rule of interpretation is one more reason why INA § 241(a)(5) must be interpreted to apply only prospectively.

* * * * *

In sum, using the ordinary tools of statutory construction, it is plain that Congress intended INA § 241(a)(5) to apply only prospectively to people who reentered the United States after IIRIRA's effective date.

B. An unambiguous expression of congressional intent is not needed for a court to find that, under *Landgraf* step one, Congress intended a statute to apply prospectively.

1. Even courts that have rejected the conclusion that Congress expressly provided that INA § 241(a)(5) operates only prospectively have acknowledged the force of the foregoing arguments. Indeed, the Tenth Circuit in this very case agreed that "Congress's elimination of the previous retroac-

tivity language lends weight to the argument that Congress intended the statute to apply only prospectively." Pet. App. 14a. Similarly, the Seventh Circuit observed that "[t]here is no question that some statutory evidence points to the conclusion reached by the Ninth and Sixth Circuits that Congress may not have desired [the reinstatement provision] to be applied retroactively." *Faiz-Mohammad*, 395 F.3d at 804.

The sole reason these courts have nonetheless proceeded to the second step of the *Landgraf* analysis is that they have inappropriately stood the presumption against retroactivity on its head and effectively created a non-existent presumption against *prospectivity*. For example, rather than end its analysis with the implication of prospectivity derived from the normal rules of statutory construction, the Tenth Circuit in this case erroneously relied on the *St. Cyr* decision to hold:

> Congress's failure to expressly state that the reinstatement statute *applied* to aliens who re-entered the country prior to its effective date, does not mean Congress therefore *unambiguously* intended for the statute *not* to apply to those aliens. Consequently, we must determine whether INA § 241(a)(5)'s bar of Fernandez' adjustment application is an impermissible retroactive effect of the statute.

Pet. App. 16a (second emphasis added). The other courts that have rejected the conclusion that Congress expressly provided that INA § 241(a)(5) operates only prospectively have made the same error, holding that "*Landgraf*'s first step is satisfied only where the 'statutory language [is] *so clear* that it could sustain *only one interpretation*.'" *Ojeda-Terrazas*, 290 F.3d at 298 (quoting *St. Cyr*, 533 U.S. at 317) (emphasis added); see also *Avila-Macias*, 328 F.3d at 113; *Alvarez-Portillo*, 280 F.3d at 865; *Ojeda-Terrazas*, 290 F.3d at 300; *Arevalo*, 344 F.3d at 11-12; *Sarmiento Cisneros*, 381 F.3d at 1282; *Faiz-Mohammad*, 395 F.3d at 803-804; *Velasquez-Gabriel*, 263 F.3d at 108.

That approach to the first step of the *Landgraf* analysis is

fundamentally flawed. This Court has never held that Congress must speak unambiguously when it intends to apply a statue only prospectively. In *Landgraf*, "the presumption *against* retroactivity was reaffirmed in the traditional rule requiring *retroactive* application to be supported by a clear statement." *Lindh*, 521 U.S. at 325 (emphasis added). By requiring a similar "unambiguous" directive from Congress that INA § 241(a)(5) be prospective only, courts such as the Tenth Circuit below have turned the traditional clear-statement rule upside down. As this Court has recognized, *Landgraf* "referred to 'express command[s],' 'unambiguous directive[s],' and the like where it sought to reaffirm that clear-statement rule, *but only there*." *Ibid.* (emphasis added); see also *In re Minarik*, 166 F.3d 591, 598 (3d Cir. 1999) ("normal rules of statutory construction may apply to *remove* * * * the possibility of retroactivity" but "[n]othing short of an unambiguous directive * * * will justify giving a statute retroactive effect") (emphasis in original).

2. As noted above, courts that have rejected the statutory arguments for prospective application of INA § 241(a)(5) have interpreted this Court's decision in *St. Cyr* to require unambiguous congressional intent that the statute apply only prospectively. See, *e.g.*, Pet. App. 16a. That approach reflects a fundamental misunderstanding of this Court's decision: In *St. Cyr*, the Court considered whether IIRIRA § 304(b)—which narrowed the class of noncitizens eligible for discretionary relief from deportation and precluded such relief for noncitizens convicted of aggravated felonies—applied to someone who pleaded guilty to such a crime before IIRIRA's enactment. *St. Cyr*, 533 U.S. at 293-297. The government argued that Congress intended the provision to apply retroactively to all removals initiated after IIRIRA's effective date. The Court rejected that argument, and concluded that congressional intent regarding retroactivity was unclear and that application of § 304(b) to the petitioner would produce an impermissible retroactive effect.

In rejecting the government's interpretation of the statute in the first stage of the *Landgraf* analysis, the Court explained that, in order to apply *retroactively*, the statute must be "'so clear that it could sustain only one interpretation.'" *Id.* at 317 (quoting *Lindh*, 521 U.S. at 328 n.4). This "only one interpretation" standard "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 316. Thus, in light of the presumption against retroactive legislation, the Court held that "[a] statute may not be applied *retroactively* * * * absent a clear indication from Congress that it intended such a result." *Ibid.* (emphasis added); see also *Bowen*, 488 U.S. at 208 ("[C]ongressional enactments * * * will not be construed to have *retroactive* effect unless their language requires this result.") (emphasis added).

However, nothing in *St. Cyr* remotely suggests that Congress must speak "unambiguously" if it intends exclusively *prospective* application of a statute. There is no "potential unfairness" in such application and, thus, no need for courts to rely on any presumptions concerning congressional intent. The lower court's misapplication of *St. Cyr*'s clear-statement requirement fails to recognize that "the only 'presumption' mentioned in [*Landgraf*] is a general presumption *against* retroactivity." *Hughes Aircraft*, 520 U.S. at 950 (emphasis in original). *St. Cyr* simply applied, but did not expand upon, that basic presumption. Thus, this Court's retroactivity cases, including *St. Cyr*, "require[] an express congressional command only to overcome [the] presumption against retroactivity, not to ensure application of a statutory term prospectively." *Goncalves*, 144 F.3d at 129; see also, *e.g.*, *Scott* v. *Boos*, 215 F.3d 940, 947-948 (9th Cir. 2000) ("A negative inference may be used to apply a statute prospectively because there is no traditional presumption against applying a statute prospectively. Concerns about retroactive effect are not relevant and there is no requirement that Con-

gress clearly intended to have a statute apply prospectively.").

3. Not only was the Tenth Circuit's reliance on *St. Cyr* misplaced, but the court also ignored the implications of this Court's decision in *Lindh*, which held that Congress need not speak with the same unambiguous clarity to apply a statute exclusively to future conduct as it must when seeking to apply the statute to past conduct. The Court held that Congress intended chapter 153 of AEDPA, which addresses habeas petitions in non-capital state cases, to apply only prospectively to cases filed after AEDPA became effective. The Court observed that although AEDPA's chapter 153 contained no explicit statement regarding its temporal scope, Congress had explicitly provided that chapter 154, which addresses similar habeas claims in capital cases, "shall apply to cases pending on or after the date of enactment of this Act." 521 U.S. at 327. The Court explained that it "read [the provision] expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Ibid.*

Although it was able to draw a negative inference from Congress's silence on the scope of chapter 153, the *Lindh* Court did not conclude that the statute was entirely clear on the subject. Quite the contrary; the Court recognized that AEDPA "does not speak to the present issue with flawless clarity," but went on to "agree with Lindh that it tends to confirm the interpretation * * * that we adopt." *Id.* at 332. Indeed, the Court explained that the language prescribing the temporal scope of chapter 154 "may not amount to the clear statement required for a mandate to apply a statute in the disfavored retroactive way," but was sufficient to cause the Court to hold that Congress intended chapter 153 to apply only to cases filed after that provision became effective. *Id.* at 328-329. Ultimately, although recognizing problems with its

interpretation of the statute, the *Lindh* Court held that its conclusion "accords more coherence" to the statute than any other possible interpretation. *Id.* at 336. "That," said the Court, "is enough." *Ibid.*

As in *Lindh*, application of the normal rules of statutory construction leads to the conclusion that Congress intended INA § 241(a)(5) to apply only to those persons who illegally reentered the country after IIRIRA's effective date, and not to persons like petitioner who reentered more than 15 years before that date. Even if Congress's elimination of retroactivity language from the prior statutory provision, the legislative history of INA § 241(a)(5), and Congress's knowledge of the background legal principles against which it legislated do not "unambiguously" demonstrate congressional intent, by far the most plausible interpretation of the statute is that Congress meant it to apply only prospectively. Here, as in *Lindh*, "[t]hat is enough." 521 U.S. at 336.

II. Application Of INA § 241(a)(5) To Persons Who Reentered The United States Before April 1, 1997, Is Impermissibly Retroactive.

If, despite the foregoing analysis, this Court concludes that Congress has not "prescribed the statute's proper reach," then the Court "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. If application of INA § 241(a)(5) to persons who reentered the United States before April 1, 1997, "would operate retroactively," then the "traditional presumption" against retroactive legislation "teaches that it does not govern." *Ibid.* Because application of the reinstatement provision to persons who reentered the United States before that date would indeed increase penalties for the previously completed reentries and impair rights that these persons possessed when they acted, INA § 241(a)(5) may not be applied to such persons.

A. The relevant date for retroactivity analysis is the date of reentry.

Retroactivity analysis asks "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-270. "A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'" *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver* v. *Graham*, 450 U.S. 24, 31 (1981)); see also *Union Pacific R.R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (a retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"). Thus, as Justice Scalia has observed, "[t]he critical issue" in retroactivity analysis is identifying "the relevant activity that the [statute in question] regulates." *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring); see also *Landgraf*, 511 U.S. at 270 (retroactivity analysis focuses on relationship between change in law and the "*relevant* past event") (emphasis added).

Here, the relevant activity is illegal reentry into the United States. Congress adopted IIRIRA because it found that "the ability to cross into the United States over and over with no consequences undermines the credibility of our efforts to secure the border." H.R. REP. NO. 104-469(I), at 155. Thus, INA § 241(a)(5) specifies certain consequences if an "an alien * * * reenter[s] the United States illegally after having been removed or having departed voluntarily, under an order of removal." In particular, it provides that an illegal reentrant "is not eligible and may not apply for any relief" under the INA. Once someone has illegally reentered the United States after deportation, there is nothing the person can do thereafter to avoid the statute's consequences. It does not matter whether the individual marries a U.S. citizen, submits an application for adjustment of status, applies for suspension of deportation or voluntary departure, or performs any other act subsequent to reentry. Regardless of personal circum-

stances and subsequent conduct, if someone has illegally reentered the country, INA § 241(a)(5) mandates reinstatement without the possibility of discretionary relief.

Further evidence that reentry is the relevant conduct for purposes of retroactivity analysis comes from the criminal parallel to INA § 241(a)(5). Under the *Ex Post Facto* Clause, Congress may not impose criminal penalties on conduct antedating a statute. Recognizing this strict prohibition, Congress made clear, when amending the criminal provision concerning illegal reentries after deportation—the same conduct addressed by INA § 241(a)(5)—that although *deportations* antedating IIRIRA could serve as a factual predicate to the new provision's application, the new provision does not apply to illegal *reentries* antedating the Act. See IIRIRA § 324(c); note 15, *supra*. In drawing the line between reentry and deportation, Congress implicitly recognized that the critical conduct for purposes of retroactivity analysis is reentry.[16]

Accordingly, because illegal reentry is "the conduct which serves as the basis for the [reinstatement] proceeding," *Bejjani*, 271 F.3d at 677, it is the date of that act that constitutes the relevant "reference point," *Martin*, 527 U.S. at 363 (Scalia, J., concurring), for purposes of retroactivity analy-

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[16] The same considerations that undergird the *Ex Post Facto* Clause apply in the civil context. In fact, this Court has repeatedly relied on cases decided under the *Ex Post Facto* Clause when addressing questions of statutory retroactivity in the civil context. See, *e.g.*, *St. Cyr*, 533 U.S. at 317-318 (citing *Lindh*, 521 U.S. 320); *Hughes Aircraft*, 520 U.S. at 948 (citing *Collins* v. *Youngblood*, 497 U.S. 37 (1990); *Beazell* v. *Ohio*, 269 U.S. 167 (1925)); *Landgraf*, 511 U.S. at 266-267, 269 n.23 (citing *Weaver*, 450 U.S. 24; *Miller*, 482 U.S. 423). Because of the *Ex Post Facto* Clause, Congress could not have applied IIRIRA § 324(c) to reentries antedating the Act. Although Congress could have made INA § 241(a)(5) apply retroactively had it done so *explicitly*, it did not in fact do so.

sis.[17]

B. Application of INA § 241(a)(5) to persons who reentered the United States before April 1, 1997, attaches new legal consequences to past conduct.

1. Application of INA § 241(a)(5) to persons who reentered the United States before April 1, 1997, is categorically precluded because it would abolish the right of reentrants to pursue various types of relief that they could seek before that date.

Applying INA § 241(a)(5) to an individual who, after being deported, reentered the United States when relief from renewed deportation was available to illegal reentrants would "impair rights" the person "possessed when he acted" and "increase" his "liability for past conduct." *Landgraf*, 511 U.S. at 280. As a result, retroactive application of that provision is precluded absent express congressional mandate.

INA § 241(a)(5) abolishes certain substantive rights noncitizens possessed before IIRIRA's effective date, April 1, 1997. Specifically, before IIRIRA took effect, individuals who unlawfully reentered the United States after having previously been deported had the right to seek various forms of discretionary relief that, if granted, would have allowed them to legalize their status in the country or avoid renewed deportation.

For example, before IIRIRA, an illegal reentrant could—either proactively or as a defense to deportation—apply for

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[17] See, *e.g.*, *Avila-Macias*, 328 F.3d at 114 (application of IIRIRA to someone who reentered after statute's effective date "does not have an impermissible retroactive effect *because the consequences of an illegal reentry at the time that he reentered* are the consequences he faces now") (emphasis added); *Alvarez-Portillo*, 280 F.3d at 861 ("the substantive defenses to removal eliminated by § 241(a)(5) may not be retroactively denied to aliens *who illegally reentered prior to enactment*") (emphasis added).

an adjustment of status (and the requisite waiver of the prior deportation order). See 8 U.S.C. § 1255(a), (i) (1996); 8 C.F.R. §§ 212.2, 245.1, 245.2, 245.10 (1997); *Arevalo*, 344 F.3d at 5 (under the pre-IIRIRA regime "[e]ven those reentering the United States illegally could seek such an adjustment"); *Alvarez-Portillo*, 280 F.3d at 862 (before IIRIRA took effect "aliens in deportation proceedings were allowed to avoid removal by seeking and obtaining an adjustment of status to lawful permanent resident").

Similarly, before IIRIRA, a person placed in deportation proceedings could seek "suspension of deportation" (and thus obtain permanent residency), request "voluntary departure" (and thus avoid entry of a deportation order), or apply for asylum—notwithstanding the fact that the person had reentered the country unlawfully. See 8 U.S.C. §§ 1158(a), 1254(a)(1), (e)(1) (1996); 8 C.F.R. § 244.1 (1997); *Dinnall* v. *Gonzales*, 421 F.3d 247, 260-261 (3d Cir. 2005) (noting that person who reentered United States before IIRIRA could have applied for voluntary departure under law in effect at time of reentry).

INA § 241(a)(5), however, provides that an illegal reentrant "is not eligible and may not apply for any relief" under the Immigration and Nationality Act. As a result, a person subject to INA § 241(a)(5) can neither apply for nor receive adjustment of status, cancellation of removal,[18] asylum, or voluntary departure. Consequently, the government's application of INA § 241(a)(5) to those who reentered the United States when such forms of relief were still available to illegal reentrants "impairs vested rights acquired under existing laws" and "attaches a new disability, in respect to transactions or considerations already past," *Landgraf*, 511 U.S. at

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[18] IIRIRA "replaced 'suspension of deportation' with 'cancellation of removal,'" its functional equivalent. *Tang* v. *INS*, 223 F.3d 713, 718 (8th Cir. 2000); see also page 40, *infra* (discussing differences between the two).

269 (citation and internal quotation marks omitted), thus giving the statute an impermissible retroactive effect. See *St. Cyr*, 533 U.S. at 321.

As this Court recognized in *Martin*, "[t]he inquiry into whether a statute operates retroactively demands a common-sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" 527 U.S. at 357-358 (quoting *Landgraf*, 511 U.S. at 270). Here, there can be no doubt that the government's retroactive application of INA § 241(a)(5) to persons who unlawfully reentered the country before IIRIRA's effective date attaches new legal consequences to their completed reentries. As a result, retroactive application is precluded under *Landgraf*.

2. *Application of INA § 241(a)(5) to petitioner would deprive him of specific rights he possessed under prior law.*

Even if retroactive application of INA § 241(a)(5) were not categorically precluded because it deprives individuals of the possibility of relief that had existed pre-IIRIRA, application as to petitioner would violate *Landgraf* because, but for the application of INA § 241(a)(5), he was and still would be entitled to seek, and have the opportunity to receive, multiple forms of discretionary relief.

a. At all times since his reentry into the country, petitioner has been eligible for at least some form of discretionary relief. From the moment he entered, he was entitled to seek, and eligible to receive, voluntary departure. From 1989 onward, he was also entitled to seek, and eligible to receive, suspension of deportation (or its replacement, cancellation of removal). And since his 2001 marriage, he was additionally entitled to seek, and eligible to receive, adjustment of status. But for the retroactive application of INA § 241(a)(5), petitioner would remain eligible for each of these forms of relief.

Voluntary departure. Petitioner would be eligible for the

defense of voluntary departure *but for* the government's application of INA § 241(a)(5) to him. See 8 U.S.C. § 1229c. Voluntary departure confers significant benefits on an individual as compared to deportation or removal. See *Dinnall*, 421 F.3d at 260; *Alimi* v. *Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004); *Contreras-Aragon* v. *INS*, 852 F.2d 1088, 1090 (9th Cir. 1988). The benefits of voluntary departure generally include the ability to determine the time and manner of one's departure from the United States, and the ability to select a preferred destination. See *Bocova* v. *Gonzales*, 412 F.3d 257, 265 (1st Cir. 2005). Moreover, a person granted voluntary departure is usually not detained before leaving the United States, whereas a person subject to deportation is frequently jailed during the period before deportation (as petitioner was here, for nearly a year). See *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004). But the greatest benefit to an individual granted voluntary departure is that he may, after departure, proceed to a U.S. consulate in his home country and, if otherwise eligible, immediately seek readmission to the United States. By contrast, a person deported or removed from the United States must wait many years—5 years under pre-IIRIRA law and up to 20 years under current law—before seeking readmission. See 8 U.S.C. § 1182(a)(6)(B) (1996); 8 U.S.C. § 1182(a)(9)(A)(ii); *Dinnall*, 421 F.3d at 260; *Bocova*, 412 F.3d at 265 n.1; *Alimi*, 391 F.3d at 892. Thus, because petitioner was removed under the government's flawed interpretation of INA § 241(a)(5), he purportedly is now inadmissible for at least 20 years. A.R. 3.

Cancellation of removal. Petitioner would be eligible for the defense of cancellation of removal (which replaced suspension of deportation) *but for* the government's application of INA § 241(a)(5) to him. See 8 U.S.C. § 1229b(b). Had he been given an opportunity to apply for, and had he obtained, cancellation of removal (or suspension of deportation), petitioner's status would have been adjusted to that of lawful permanent resident.

As discussed above (at note 18), pre-IIRIRA suspension of deportation and post-IIRIRA cancellation of removal are functional equivalents. See *Tang*, 223 F.3d at 718. Though the respective standards are different, the differences are irrelevant here; petitioner would be eligible for relief under either regime.

Before IIRIRA's enactment, an individual placed into deportation proceedings was eligible for suspension of deportation if he had seven years continuous presence in the United States, was of good moral character, and could demonstrate "extreme hardship" to either himself or a U.S.-citizen child or spouse. See 8 U.S.C. § 1254(a)(1) (1996). After IIRIRA's enactment, such a person is eligible for cancellation of removal if he has ten years continuous presence in the United States, is of good moral character, and can demonstrate "exceptional and extremely unusual hardship" to a U.S.-citizen child or spouse. See 8 U.S.C. § 1229b(b).

Petitioner satisfies each of these criteria: He reentered the United States "shortly after his last deportation in October of 1981" and—until his removal during the course of these proceedings—"lived in this country ever since." Pet. App. 3a. Petitioner, who was never arrested for any crime in the twenty-one years following his reentry, is married to a U.S. citizen and has a U.S.-citizen son who was born in 1989. Pet. App. 3a; A.R. 11-15, 23, 42. His wife, a "homemaker with few job skills," and his asthmatic son are dependent upon him for financial support and, having been deprived of his earnings, were on the verge of losing the family home until anonymous donors paid off their mortgage earlier this week. See D. Romboy, *Yes! Home For Christmas: 3 Donors Pay Off Mortgage For Wife Of Deported Man*, DESERET MORNING NEWS, Dec. 22, 2005, at A1, *available at* http://deseretnews.com; D. Romboy, *No Home For The Holidays*, DESERET MORNING NEWS, Dec. 17, 2005, at A1, *available at* http://deseretnews.com; see also Romboy, *Outcast in Mexico*, at A1. Thus, based on his two decades of continuous pres-

ence in the United States, good moral character, and the "extreme and exceptionally unusual" hardship to his U.S.-citizen wife and child, petitioner would be eligible for cancellation of removal today, and was eligible for suspension of deportation as of 1989—but for application of INA § 241(a)(5).

Adjustment of status. Petitioner is married to a U.S. citizen, who applied for an immediate-relative visa on his behalf. Pet. App. 3a & n.5. Based on his wife's visa application and his submission of a Form I-212 Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, *ibid.*, petitioner would be entitled to apply for adjustment of status and, if granted, become a legal permanent resident *but for* the government's application of INA § 241(a)(5) to him. See 8 U.S.C. § 1255(a), (i); 8 C.F.R. §§ 212.2, 212.7, 245.1, 245.2, 245.10. Indeed, not only would petitioner be entitled to apply for adjustment of status, but "his marriage would have made him *a likely candidate* for adjustment of status" but for application of INA § 241(a)(5). *Alvarez-Portillo*, 280 F.3d at 862 (emphasis added).[19]

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[19] Petitioner submitted an application for adjustment of status on April 30, 2001, notwithstanding INA § 241(a)(5). Pet. App. 3a; A.R. 46. The government argued below that petitioner's application was denied. Pet. App. 4a. But the purported denial was neither signed nor provided to petitioner (*ibid.*), and the government has expressly disavowed any reliance on the purported denial in this Court. U.S. Cert. Resp. 5 n.2. Moreover, even if petitioner's affirmative application for adjustment of status had in fact been denied, that would not resolve this case. Under prior law, petitioner would have been entitled to renew a previously denied application for adjustment of status if he were subsequently placed in deportation proceedings. See 8 C.F.R. § 245.2(a)(5)(ii) (1997); *Lopez-Flores* v. *Dep't of Homeland Sec.*, 387 F.3d 773, 776-777 (8th Cir. 2004) (holding application of § 241(a)(5) impermissibly retroactive even when alien had already applied for and been denied adjustment of status because, "absent the § 241(a)(5) provisions, [petitioner] would have had the opportunity to renew his applica-

b. The court of appeals rejected the argument that application of INA § 241(a)(5) to petitioner would be impermissibly retroactive, on the grounds that petitioner's marriage "did not occur until 2001" and that "the only event completed before [IIRIRA's effective date] was his illegal re-entry into the United States." Pet. App. 17a & n.12. In so holding, the court of appeals focused on the wrong event for purposes of retroactivity analysis. As we explained above (see Part II.A), INA § 241(a)(5) regulates reentry, not marriage, and thus the relevant event for present purposes is petitioner's reentry, not his marriage. Because application of INA § 241(a)(5) would attach a new legal consequence—ineligibility for discretionary relief—to an event—petitioner's reentry—that was completed before the statute's enactment, its application to petitioner is impermissibly retroactive.

That petitioner was not yet eligible as of April 1, 1997, to apply for adjustment of status does not obviate the fact that he was at all points subsequent to his 1982 reentry and before April 1, 1997, eligible for *some* form of relief (to wit, voluntary departure and, as of 1989, suspension of deportation). Nor does it obviate the fact that preventing him from applying for the additional relief to which he is now otherwise eligible, *i.e.* adjustment of status, "attaches new legal consequences to events completed before [IIRIRA's] enactment." *Landgraf*, 511 U.S. at 269-270. If, as the government contends, INA § 241(a)(5) precludes petitioner from receiving "any relief" under the Immigration and Nationality Act,

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tion for adjustment of status in the context of a subsequent deportation proceeding"); *Randall* v. *Meese*, 854 F.2d 472, 474-475 (D.C. Cir. 1988) ("Should the alien fail to gain adjustment [in his initial application], he is entitled to a *de novo* review of his application in the context of deportation proceedings."). By subjecting petitioner to reinstatement without an opportunity to pursue relief, INA § 241(a)(5) deprived petitioner of the right to renew his adjustment application, if denied, before an immigration judge in removal proceedings.

he would no longer be entitled to seek suspension of deportation or voluntary departure, although he was entitled to apply for both before April 1, 1997.[20]

The fact that suspension of deportation and voluntary departure would be *defenses* to deportation in no way suggests that these are not relevant for purposes of retroactivity analysis. As this Court held unanimously in *Hughes Aircraft*, "eliminat[ion of] a defense" previously available is barred by the "presumption against retroactivity" because it "attach[es] a new disability, in respect to transactions or considerations already past." 520 U.S. at 948 (internal quotations omitted); see also *St. Cyr*, 533 U.S. at 321 (holding same with respect to elimination of § 212(c) relief, which had offered defense to removal). Thus, as the Eighth Circuit concluded with respect to someone who had reentered the United States before IIRIRA's effective date but had not affirmatively sought relief before being placed in reinstatement proceedings after IIRIRA's effective date, application of INA § 241(a)(5) "had an impermissible retroactive effect" because the reentrant "had a reasonable expectation he could either file for a discretionary adjustment of status, or wait and seek the adjustment as a defense to a later deportation proceeding," and "§ 241(a)(5) as applied by the INS has now deprived him of that defense." *Alvarez-Portillo*, 280 F.3d at 867.

Thus, even if retroactivity analysis were properly confined to a narrow comparison of, on the one hand, the relief immediately available to petitioner the instant before IIRIRA took effect and, on the other hand, the relief immediately available to petitioner the instant after IIRIRA took effect, it

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[20] Moreover, under the law as it stood before April 1, 1997, petitioner would have been eligible to apply for adjustment of status upon marriage to his long-time, U.S.-citizen partner, with whom he was raising their U.S. citizen child. Thus, petitioner had a "reasonable[] * * * expectation that the opportunity to pursue such a defense would be available to him in later instituted deportation proceedings." *Lopez-Flores*, 387 F.3d at 776.

is clear that INA § 241(a)(5) "changes the legal consequences of acts completed before its effective date." *Weaver*, 450 U.S. at 31.

c. Finally, even if the inquiry were limited to whether petitioner was entitled to seek, and eligible to receive, discretionary relief at the time of his 1982 illegal reentry, application of INA § 241(a)(5) to petitioner would still deprive him of relief to which he then was entitled—voluntary departure. See 8 U.S.C. § 1254(e)(1) (1982). Furthermore, the fact that petitioner could expect to *become* eligible for other relief over time, by, for example, living in the United States for the requisite period and demonstrating good moral character (the prerequisites for suspension of deportation) or by marrying a U.S. citizen (the prerequisite for adjustment of status), itself demonstrates that retroactive application of INA § 241(a)(5) to petitioner would violate *Landgraf*.

C. The fact that the relief available to petitioner before IIRIRA was discretionary is irrelevant for purposes of retroactivity analysis.

Allowing someone otherwise subject to removal the opportunity to apply for discretionary relief gives that person a chance to avoid removal. And as this Court has previously recognized, "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." *St. Cyr*, 533 U.S. at 325 (citing *Hughes Aircraft*, 520 U.S. at 949; *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937)). Thus, the fact that a particular form of "relief is discretionary does not affect" the conclusion that denial of the opportunity to seek such relief is impermissibly retroactive. *Ibid.*; see also *Sarmiento Cisneros*, 381 F.3d at 1284 ("That adjustment of status relief is discretionary does not defeat Sarmiento's argument that section 1231(a)(5) has an impermissible retroactive effect when applied to him."); *Arevalo*, 344 F.3d at 15 ("Contrary to the INS's position, we do not think it is significant that adjustment of status is a discretionary form of relief.").

Although there was no guarantee that discretionary relief would in fact be granted, a person who reentered the United States before IIRIRA's effective date nonetheless had a well-established right to *seek* such relief. Accordingly, applying INA § 241(a)(5) to deny a person who reentered the United States before IIRIRA's effective date the opportunity to obtain an otherwise available form of discretionary relief is an impermissibly retroactive denial of "a substantive right." *Arevalo*, 344 F.3d at 14; see also *id.* at 15 ("A right to seek relief is analytically separate and distinct from a right to the relief itself. Consequently, an alien is not precluded from having a vested right in a form of relief merely because the relief itself is ultimately at the discretion of the Executive Branch."); (citations omitted); *Lopez-Flores*, 387 F.3d at 776 ("the fact that Lopez-Flores may have been a weaker candidate than Alvarez-Portillo for discretionary adjustment of status does not change the fact that he had a reasonable expectation that such a defense would be available to him to assert in a subsequent deportation proceeding").

D. Petitioner is not required to demonstrate reliance on prior law in order to establish impermissible retroactivity.

Before IIRIRA, petitioner and others similarly situated, when deciding whether to reenter the United States, can reasonably be expected to have known that they either were eligible or could become eligible to legalize their status in the United States after reentry. Leaving behind family and friends and all that is familiar to establish a new life in a foreign land is not easy. It requires a significant investment of economic and emotional resources. Given the ever-present danger of deportation, the investment is a highly risky one. The availability of a possible defense to deportation—via adjustment of status, suspension of deportation, or some other form of discretionary relief—reduces that risk appreciably. The possibility of relief means that someone who, subsequent to reentry, gets married, has children, and otherwise builds a

stable and productive life in America need not fear certain deportation and the concomitant loss of all that he or she has achieved. Cf. *St. Cyr*, 533 U.S. at 325 (noting the "clear difference" between possible and certain deportation).

Accordingly, before IIRIRA the availability of discretionary relief may well have affected the calculus of a person contemplating reentry after deportation. See *Dinnall*, 421 F.3d at 262 ("It is not unreasonable to assume that many of these aliens may well have reentered the country with the understanding that they might be eligible for some form of discretionary relief."). Stated differently, someone such as petitioner is likely to have relied on the immediate or potential availability of discretionary relief when choosing to reenter the United States. The bar to such relief subsequently imposed by INA § 241(a)(5) is therefore "the type of legal change that would have an impact on private parties' planning." *Landgraf*, 511 U.S. at 282.

That said, petitioner need not demonstrate that he himself relied on prior law in order to prove that the application of INA § 241(a)(5) to him would be impermissibly retroactive. As the Third Circuit has observed, this Court "has never required actual reliance or evidence thereof in the *Landgraf* line of cases, and has in fact assiduously eschewed an actual reliance requirement." *Ponnapula* v. *Ashcroft*, 373 F.3d 480, 491 (3d Cir. 2004). Simply put, "[t]he likelihood that the party before the court did or did not in fact rely on the prior state of the law is not germane to the question of retroactivity." *Id.* at 493; see also *Olatunji*, 387 F.3d at 389 ("we do not believe that subjective reliance is, or ought to be, relevant to the question of whether a particular statute is impermissibly retroactive, as such is neither dictated by Supreme Court precedent nor related to the presumption of congressional intent underlying the bar against retroactivity"). Indeed, "no form of reliance is necessary" because requiring proof of "reliance (whether subjective or objective)" would "all but turn the presumption against retroactivity on its head." *Id.* at 388-

389. "Whether a plaintiff did or did not rely on a prior statutory scheme is irrelevant to whether that scheme in fact has a retroactive effect on that plaintiff." *Id.* at 391.[21]

Landgraf and its progeny also make clear that reliance need not be proven to establish impermissible retroactivity. *Landgraf* held that a statute allowing compensatory and punitive damages where none had previously been allowed could not be applied retroactively to conduct pre-dating the statute, even though the discriminatory conduct upon which such damages would have been based was already unlawful at the time it occurred. See 511 U.S. at 281-283.[22] The Court reached this conclusion despite there being no evidence that the defendant, which was sued on a *respondeat superior* theory, had in any way relied on the absence of such damages when designing and implementing its internal training and control mechanisms. See *id.* at 280-293. Similarly, in *Hughes Aircraft* this Court held that a statute eliminating a previously accepted defense to *qui tam* actions brought under the False Claims Act could not be applied retroactively even though the conduct at issue was illegal when it occurred and could have resulted in equally large damages if the government, rather than a private relator, had initiated the action. In so holding, the Court did not even discuss, let alone require, reliance. See 520 U.S. at 946-952.

Even *St. Cyr*—which is often cited by the government in

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[21] Because petitioner was subjected to INA § 241(a)(5), he was denied any opportunity to demonstrate actual reliance—or, for that matter, to present evidence that he was eligible for and in fact likely to have received discretionary relief from removal.

[22] *Landgraf*, like *Hughes Aircraft* and *St. Cyr*, makes clear that even persons who break the law are entitled to protection from the retroactive application of statutes that attach new legal consequences to past conduct. See *Landgraf*, 511 U.S. at 282 n.35 ("Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past.").

support of the proposition that reliance must be proven (see, *e.g.*, Supplemental Brief for Respondent, 2002 WL 32355572, at *3, *Chambers* v. *Ashcroft*, 307 F.3d 284 (4th Cir. 2002) (No. 00-6364))—demonstrates that retroactivity analysis entails a categorical approach that disregards a particular petitioner's actual reliance on prior law. In *St. Cyr*, the Court held that it was impermissibly retroactive to eliminate the possibility of relief under INA § 212(c) for persons who had pled guilty to an offense but who, notwithstanding their conviction, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect. In reaching this result, the Court did not determine (and did not invoke a lower court finding) that St. Cyr himself had actually relied on the possibility of § 212(c) relief when entering his plea. Rather than focus on St. Cyr in particular, the Court adopted a categorical approach, speaking not of St. Cyr individually but of "defendants * * * in St. Cyr's position," 533 U.S. at 323, and of "other aliens like him." *Id.* at 325. Notably, the holding in *St. Cyr* is not limited either to the particular litigant before the court or to those who could demonstrate actual reliance on the prior law. Instead, the prohibition on retroactive elimination of § 212(c) relief extends to *all* persons who had been eligible for such relief at the time of their guilty plea, without regard for individual reliance.

Thus, the question whether petitioner actually relied on pre-IIRIRA law is irrelevant to the determination whether applying INA § 241(a)(5) to him would be impermissibly retroactive. Because actual reliance need not be proven, such a demonstration is unnecessary, particularly when it is probable that, "as a general matter," *St. Cyr*, 533 U.S. at 322, "the *class* of aliens who chose to illegally reenter the United States prior to the enactment of § 241(a)(5)," *Dinnall*, 421 F.3d at 262 (emphasis added), did so on the reasonable expectation that discretionary relief from deportation would be available to them.

E. Retroactive application of INA § 241(a)(5) to petitioner is inequitable.

This Court has long recognized that "deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan*, 333 U.S. at 10. Because deportation, like punitive damages, "share[s] key characteristics of criminal sanctions," *Landgraf*, 511 U.S. at 281, its "retroactive imposition * * * would raise a serious constitutional question." *Ibid.* (citing, *inter alia*, *De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts.")).

Indeed, it is well-settled that "retroactive statutes"—even purely civil ones—"raise particular concerns." *Landgraf*, 511 U.S. at 266. That is especially true when, as here, the statute in question targets noncitizens. The legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Ibid.*; see also *St. Cyr*, 533 U.S. at 315 (same). "[B]ecause noncitizens cannot vote, they are particularly vulnerable to adverse legislation." *Id.* at 315 n.39 (quoting S. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1626 (2000)). Accordingly, this Court has repeatedly recognized the "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *St. Cyr*, 533 U.S. at 320 (quoting *Cardoza-Fonseca*, 480 U.S. at 449). This principle is fully applicable here. See Part I.A.4, *supra*.

In light of the result in *St. Cyr*, moreover, it would be particularly inequitable if INA § 241(a)(5) were retroactively applied to petitioner and those in his position. *St. Cyr* held that the availability of discretionary relief from deportation may not be withheld retroactively from persons who were convicted, by guilty plea, of crimes that are now deemed to be aggravated felonies. St. Cyr himself was convicted of drug

trafficking. By contrast, petitioner's only crime is having entered the United States without inspection. To be sure, illegal reentry is a serious matter. Once here, however, petitioner conducted himself in an exemplary fashion, so much so that he would have been eligible to apply for several distinct forms of immigration relief but for the government's application of INA § 241(a)(5) to him. In over twenty years of living in the United States, he was never arrested for any reason. A.R. 11-15. On the contrary, he constructed a stable, law-abiding life in which he built a business, married a U.S. citizen, and raised a U.S.-citizen son. Pet. App. 3a; A.R. 20, 23, 42; see also Romboy, *Outcast in Mexico*, at A1. It would be ironic indeed if petitioner were denied that which St. Cyr received. Retroactively depriving petitioner of the opportunity to seek and receive the discretionary relief available from the time of his reentry through the date IIRIRA took effect would "undoubtedly impose * * * a 'new disability' in respect to past events." *Landgraf*, 511 U.S. at 283.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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CURRENT STATUTES

8 U.S.C. § 1182(a)(9)(A)(ii) (2005) provides:

> Any alien not described in clause (i) who—
>
> (I) has been ordered removed under section 240 or any other provision of law, or
>
> (II) departed the United States while an order of removal was outstanding,
>
> and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

8 U.S.C. § 1229b(b)(1) (2005) provides:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of

the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229c(a)(1) (2005) provides:

> The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

8 U.S.C. § 1255(a) (2005) provides in relevant part:

> The status of an alien who was inspected and admitted or paroled into the United States * * * may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(i) (2005) provides in relevant part:

> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—
>
> (A) who—
>
> (i) entered the United States without inspection;
>
> * * *
>
> (B) who is the beneficiary * * * of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001;

* * *

and

(C) who, in the case of a beneficiary of a petition for classification * * * is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

PRE-IIRIRA STATUTES

8 U.S.C. § 1158(a) (1996), repealed by IIRIRA § 604(a), provided:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1182(a)(6)(B) (1996), repealed by IIRIRA § 301(b)(1), provided in relevant part:

Any alien who

(i) has been arrested and deported,

* * *

and * * * who seeks admission within 5 years of the date of such deportation or removal * * * is excludable, unless before the date of the alien's embarkation or reembarkation at a place outside the United States or attempt to be admitted from foreign

> contiguous territory the Attorney General has consented to the alien's applying or reapplying for admission.

8 U.S.C. § 1254(a) (1996), repealed by IIRIRA § 308(b)(7), provided in relevant part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence[.]

8 U.S.C. § 1254(e)(1) (1982), amended by subsequent law, provided in relevant part:

> The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), or (19) of section 1251(a) of this title * * * to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall

> establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

8 U.S.C. § 1254(e)(1) (1996), repealed by IIRIRA § 308(b)(7), provided in relevant part:

> Except as provided in paragraph (2), the Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (2), (3) or (4) of section 1251(a) of this title * * * to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

8 U.S.C. § 1255(a) (1996), amended by Pub. L. 106-386 § 1506(a)(1)(A), 114 Stat. 1464 (2000), provided in relevant part:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(i) (1996), amended by IIRIRA § 376(a), provided in relevant part:

> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States who—
>
> (A) entered the United States without inspection
>
> * * *
>
> may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

IIRIRA

IIRIRA § 212(e), Pub. L. No. 104-208 § 212(e), provides:

> EFFECTIVE DATE.—Section 274C(f) of the Immigration and Nationality Act, as added by subsection (b), applies to the preparation of applications before, on, or after the date of the enactment of this Act.

IIRIRA § 322(c), Pub. L. No. 104-208 § 322(c), provides:

> EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act. Subparagraphs (B) and (C) of section 240(c)(3) of the Immigration and Nationality Act, as inserted by section 304(a)(3) of this division, shall apply to proving such convictions.

IIRIRA § 342(b), Pub. L. No. 104-208 § 342(b), provides:

> EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to incitement regardless of when it occurs.

IIRIRA § 347(c), Pub. L. No. 104-208 § 347(c), provides:

> EFFECTIVE DATE.—The amendments made by this section shall apply to voting occurring before, on, or after the date of the enactment of this Act.

IIRIRA § 348(b), Pub. L. No. 104-208 § 348(b), provides:

> EFFECTIVE DATE.—The amendment made by subsection (a) shall be effective on the date of the enactment of this Act and shall apply in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has been entered as of such date.

IIRIRA § 351(c), Pub. L. No. 104-208 § 351(c), provides:

> EFFECTIVE DATE.—The amendments made by this section shall apply to applications for waivers filed before, on, or after the date of the enactment of this Act, but shall not apply to such an application for which a final determination has been made as of the date of the enactment of this Act.

CURRENT REGULATIONS

8 C.F.R. § 212.2(e) provides:

> An applicant for adjustment of status under section 245 of the Act and part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.

8 C.F.R. § 212.7(a)(1)(ii) provides:

> An applicant for adjustment of status who is excludable and seeks a waiver under section 212(h) or (i) of the Act shall file an application on Form I-601 with the director or immigration judge considering the application for adjustment of status.

8 C.F.R. § 245.1 provides in relevant part:

> (a) General. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is immediately available at the time of filing of the application. * * *
>
> (b) Restricted aliens. The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act, unless the alien establishes eligibility under the provisions of section 245(i) of the Act and § 245.10, is not included in the categories of aliens prohibited from applying for adjustment of status listed in § 245.1(c), is eligible to receive an immigrant visa, and has an immigrant visa immediately available at the time of filing the application for adjustment of status:
>
> * * *
>
> (3) Any alien who was not admitted or paroled following inspection by an immigration officer[.]

8 C.F.R. § 245.2(a)(3)(iii) provides:

> An alien who seeks adjustment of status under the provisions of section 245(i) of the Act must file Form I-485, with the required fee. The alien must

also file Supplement A to Form I-485, with any required additional sum.

8 C.F.R. § 245.10 provides in relevant part:

(a) Definitions. As used in this section the term:

(1)(i) Grandfathered alien means an alien who is the beneficiary * * * of:

(A) A petition for classification under section 204 of the Act which was properly filed with the Attorney General on or before April 30, 2001, and which was approvable when filed[.]

* * *

(b) Eligibility. An alien who is included in the categories of restricted aliens under § 245.1(b) and meets the definition of a "grandfathered alien" may apply for adjustment of status under section 245 of the Act if the alien meets the requirements of paragraphs (b)(1) through (b)(7) of this section:

(1) Is physically present in the United States;

(2) Is eligible for immigrant classification and has an immigrant visa number immediately available at the time of filing for adjustment of status;

(3) Is not inadmissible from the United States under any provision of section 212 of the Act, or all grounds for inadmissibility have been waived;

(4) Properly files Form I-485, Application to Register Permanent Residence or Adjust Status on or after October 1, 1994, with the required fee for that application;

(5) Properly files Supplement A to Form I-485 on or after October 1, 1994;

(6) Pays an additional sum of $1,000, unless payment of the additional sum is not required under section 245(i) of the Act; and

(7) Will adjust status under section 245 of the Act to that of lawful permanent resident of the United States on or after October 1, 1994.

PRE-IRRIRA REGULATIONS

8 C.F.R. § 212.2(e) (1997) provided:

Applicant for adjustment of status. An applicant for adjustment of status under section 245 of the Act and part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.

8 C.F.R. § 244.1 (1982) provided in relevant part:

Pursuant to Part 242 of this chapter and section 244 of the Act an immigration judge may authorize the suspension of an alien's deportation; or, if the alien establishes that he/she is willing and has the immediate means with which to depart promptly from the United States, an immigration judge may authorize the alien to depart voluntarily from the United States in lieu of deportation[.]

8 C.F.R. § 244.1 (1997) provided in relevant part:

Pursuant to Part 242 of this chapter and section 244 of the Act an immigration judge may authorize the suspension of an alien's deportation; or, if the alien

> establishes that he/she is willing and has the immediate means with which to depart promptly from the United States, an immigration judge may authorize the alien to depart voluntarily from the United States in lieu of deportation[.]

8 C.F.R. § 245.1 (1997) provided in relevant part:

> (a) General. Any alien who is physically present in the United States, except for an alien who is ineligible to apply for adjustment of status under paragraph (b) or (c) of this section, may apply for adjustment of status to that of a lawful permanent resident of the United States if the applicant is eligible to receive an immigrant visa and an immigrant visa is immediately available at the time of filing of the application. * * *
>
> (b) Restricted aliens. The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act, unless the alien establishes eligibility under the provisions of section 245(i) of the Act and s 245.10, is not included in the categories of aliens prohibited from applying for adjustment of status listed in s 245.1(c), is eligible to receive an immigrant visa, and has an immigrant visa immediately available at the time of filing the application for adjustment of status:
>
> * * *
>
> (3) Any alien who was not admitted or paroled following inspection by an immigration officer[.]

8 C.F.R. § 245.2(a)(3)(iii) (1997) provided:

> An alien who seeks adjustment of status under the provisions of section 245(i) of the Act must file Form I-485, with the required fee. The alien must

also file Supplement A to Form I-485, with any required additional sum.

8 C.F.R. § 245.2(a)(5)(ii) (1997) provided in relevant part:

> No appeal lies from the denial of an application [for adjustment of status] by the director, but the applicant retains the right to renew his or her application in proceedings under Part 242 of this chapter[.]

8 C.F.R. § 245.10 (1997) provided:

> (a) Eligibility. Any alien who is included in the categories of restricted aliens under s 245.1(b) may apply for adjustment of status under section 245 of the Act if the alien:
>
> (1) Is physically present in the United States;
>
> (2) Is eligible for immigrant classification and has an immigrant visa number immediately available at the time of filing for adjustment of status;
>
> (3) Is not excludable from the United States under any provision of section 212 of the Act, or all grounds for excludability have been waived;
>
> (4) Properly files Form I-485, Application to Register Permanent Residence or Adjust Status on or after October 1, 1994, with the fee required for that application;
>
> (5) Properly files Supplement A to Form I-485 on or after October 1, 1994;
>
> (6) Pay an additional sum of five times the fee required for filing Form I-485, unless payment of the additional sum is waived under section 245(i) of the Act; and
>
> (7) Will adjust status under section 245 of the Act to that of a lawful permanent resident of the United

States on or after October 1, 1994, and before October 1, 1997.